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783-274—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 325

ROY WRIGHT DE WELLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R.C.A. 1–7)[1] is reported at 345 F. 2d 387.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1965 (Pet. App. B). A petition for rehearing was denied on May 7, 1965. By order of Mr. Justice Clark, the time for filing a petition for a writ of

[1] In conformity with petitioner's designations (Pet. 1), "R.C.A." refers to the volume containing the record in the court of appeals, "R.T." refers to the three-volume reporter's transcript of the trial proceedings, and "C.T." refers to the volume containing the clerk's transcript of the matters before the district court.

certiorari was extended to and including July 6, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court properly found that a search was incident to a lawful arrest by State officials so that the items seized were admissible as evidence.

2. Whether the trial court abused its discretion in denying petitioner's second motion for a continuance.

STATEMENT

Petitioner was convicted after a trial by jury, in the United States District Court for the Southern District of Indiana, on seven counts of an indictment charging use of the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341.[2] He was sentenced to five years' imprisonment on one count, and to five years' imprisonment on each of the remaining six counts, the latter terms to run concurrently with each other and consecutively to the term first imposed (R.T. 731). The court of appeals unanimously affirmed the conviction.

1. The evidence disclosed that petitioner, a California chiropractor (R.T. 481, 511–512), had developed a machine which he called a "Detoxacolon" (R.T. 516). It was assertedly to be used for the treatment of asthma, cancer, arthritis, high blood pressure, polio, epilepsy, genital problems, and numerous

[2] Richard Broeringmeyer, who was also named in the indictment, pleaded guilty on one count before trial (R.T. 5).

other ailments (R.T. 19, 128–131, 137–138, 307–328, 400). To effect such treatments, the machine pumped water and oxygen into the patient's colon (R.T. 133, 520, 535).[3] In 1961, petitioner persuaded one Broeringmeyer to become a salesman of his machine (R.T. 9).

In May 1962, Broeringmeyer communicated with an Indiana physical therapist called "Doctor" Bull (R.T. 25–27, 172).[4] Bull and another physical therapist, "Doctor" Jackson, had been supporting an alcoholic chiropractor named Odom (R.T. 173–176, 188–189), and were anxious to be relieved of the responsibility (R.T. 176, 180, 189–190, 193). Thinking that petitioner's machine might help Odom establish some kind of practice (R.T. 177), they rented an office for Odom in Shelbyville, Indiana (R.T. 183), and executed an agreement with Broeringmeyer for the conduct of a "clinic" and the purchase of the machine (R.T. 28–29, 33–34). Later that month a "Detoxacolon" and an X-ray machine were brought to Shelbyville by petitioner and his salesman and were installed in the office rented for Odom (R.T. 38, 81, 87–88).

Shortly after his arrival in Shelbyville, petitioner had several thousand postal cards printed and mailed to rural box-holders in the Shelbyville area (R.T. 86–87, 212–216, 218–220, 222–223, 226–227). The cards offered a thorough, free physical examination to any

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[3] Recognized medical and chiropractic authorities considered the use of the machine not only valueless, but dangerous (R.T. 306, 309, 324, 326, 334–335, 338–339, 342, 352, 666–668).

[4] A physical therapist is not authorized to use the title "doctor" (R.T. 171).

recipient who telephoned for an appointment during the designated six-day period. Although Odom was not aware of the existence or nature of the cards (R.T. 198), they were sent out in his name, and they set forth his telephone number and the address of the office rented for him. The telephoned appointments prompted by the advertisement were booked by petitioner and Broeringmeyer (R.T. 88–89, 199).

Operation of the six-day "clinic" began on June 4. Upon the arrival of each patient, either petitioner or Broeringmeyer[5] would give him a perfunctory examination, substantially more limited than that which had been advertised,[6] and listen to his complaints (R.T. 64–65, 94–95, 151, 365, 381, 395, 409–410, 420–422). Petitioner or Broeringmeyer would then advise an X-ray of the colon for which a charge of $10 would be made (R.T. 64–65, 103–104, 151–152, 366, 387, 396, 410, 423). The patient would be given a barium enema and X-rayed. Within half an hour, petitioner would return with an X-ray negative of the patient's colon and an X-ray negative of an allegedly perfect colon for comparison (R.T. 66, 76, 154, 165, 368, 384, 411, 415, 425). Petitioner would point out to the patient any differences between the two, describe the difference as an abnormality, and attribute to the difference the symptoms of which the patient had

[5] Although Odom was occasionally at the office, he was always inebriated and he examined no patients and performed no function of any kind (R.T. 92, 94, 110, 185, 197, 199–200).

[6] Petitioner examined one patient by looking into his eyes and by feeling his back and sides (R.T. 410). Another was given no examination at all before being told an X-ray would be necessary (R.T. 50–51, 57).

earlier complained (R.T. 66, 76, 154, 384–385, 399–400, 415, 425). Petitioner would then suggest a prompt course of treatments with the "Detoxacolon" machine, quoting a price between $125 and $2,000 for the series (R.T. 67, 155, 369–370, 385–386, 401, 412, 425–426), and offering a discount if the entire amount were prepaid in cash (R.T. 67, 156, 390, 401, 413). If the patient agreed to the series of treatments, the first would be scheduled at the time of payment (R.T. 69, 157, 403).

2. One of the patients who arrived for a free examination was an 80-year-old man who became suspicious of the procedure (R.T. 40, 44–46). The man later talked to a friend (R.T. 51) who had developed similar suspicions after visiting the clinic. The friend reported the entire matter to the local chief of police (R.T. 250–251). The chief, with the city prosecutor and the local sheriff (R.T. 235), went to the clinic on June 5 to see if the operators were "legally licensed" (R.T. 251). As they approached the office, the chief of police met an acquaintance who said that he had just paid for a treatment (R.T. 251–252).

The chief then entered the office, observed several persons sitting in the waiting room, and introduced himself to Mrs. Broeringmeyer (R.T. 235, 253). Mrs. Broeringmeyer took him to meet petitioner's wife (R.T. 235), who came out of the "Detoxacolon" treatment room in which a patient was seen lying on a cot (R.T. 236–237, 253, 258). Petitioner's wife asked the chief to accompany her into another room "away from the patients" (R.T. 236, 254). They passed a

darkroom (R.T. 237), and entered a room containing an X-ray machine and a desk upon which lay several X-rays and a stethoscope (R.T. 236–237, 254, 256). The chief asked petitioner's wife the number of doctors in the "clinic" and the name of the doctor in charge (R.T. 257). She replied that they had two doctors, petitioner and "Doctor" Broeringmeyer, and that "Doctor" Broeringmeyer was in charge (R.T. 237, 257). She then excused herself for the announced purpose of releasing a patient (R.T. 237, 257–258). The sheriff thereupon questioned Mrs. Broeringmeyer, who said that the doctor in charge was petitioner (R.T. 238).

Petitioner soon entered the room and stated that "Doctor" Broeringmeyer was in charge (R.T. 258, 276). Broeringmeyer then came out of the darkroom and replied that petitioner was in charge (R.T. 259, 277). The chief said that he had heard enough, and asked whether either of two men had a "license to operate this clinic, chiropractor license" (R.T. 259). After each first stated that he was licensed (R.T. 259, 277), Broeringmeyer admitted that he was not a chiropractor (R.T. 260, 277), and petitioner explained that he could not find his license (R.T. 260). The chief told Broeringmeyer he "was under arrest and that, if [petitioner] didn't have a license, he was under arrest" (R.T. 262, 267, 269). The chief then seized the book in which the patient's appointments were recorded, an instruction book on the "Detoxacolon" machine, some patient history cards, and several X-ray negatives (R.T. 262, 278, 301). Under

the chief's custody, petitioner and Broeringmeyer and their wives were taken to the police headquarters (R.T. 260, 269, 278), where it was ascertained that no Indiana license had ever been issued for petitioner. The chief swore out a complaint charging both petitioner and Broeringmeyer with practicing chiropractics without a license (R.T. 260–261). The objects seized from the clinic were admitted as evidence at the subsequent trial. The court denied petitioner's motion to suppress (R.T. 240–241, 273; see R.T. 472), finding that the search was incident to a lawful arrest (R.T. 272–273).

3. On March 19, 1963, over nine months after petitioner's arrest by the chief of police, the present indictment was returned (C.T. 4). On April 1, petitioner, who was then staying in Mississippi, was arrested by federal agents, taken before a commissioner, and released on bond. He appeared with a retained attorney on April 25 and secured a continuance of his arraignment (C.T. 10–11), which ultimately was held on June 14 (C.T. 18). On this latter date, he assured his retained attorney that he would furnish him with a written history of the case and with a list of proposed witnesses and their expected testimony (C.T. 28). Thereafter the attorney informed petitioner that the trial date had been set for September 30 (C.T. 28). On September 7, petitioner wrote his attorney and the trial judge that he was ill, and that he needed a 90-day postponement of the trial (C.T. 28; Pet. App. 13). Petitioner's attorney moved for a continuance on this basis on September 19

(C.T. 20–21), and on September 24 the motion was granted (C.T. 24). Two days later, the court ordered that petitioner appear for a physical examination at the office of a named physician in Mississippi (C.T. 25). Petitioner did not appear. On October 14, the attorney wrote petitioner that the trial had been reset for December 9 (C.T. 29), and in three separate letters advised him to see the physician designated by the court in order to verify that he was critically ill (C.T. 28–29). In the last such letter, dated November 11, the attorney also advised petitioner that unless a substantial portion of the retainer fee were soon paid, he would have to withdraw from the case (C.T. 29). On November 19, not having heard from petitioner, the attorney explained the above facts to the court and moved to withdraw (C.T. 27–30). The motion was granted and petitioner was notified (C.T. 31; Pet. 7).

On November 25, petitioner secured a second attorney to represent him (C.T. 33). On December 4, the second attorney moved for a continuance, alleging that petitioner had been hospitalized with a gall bladder inflammation from September 23 to October 7 and was to avoid the stress of a trial prior to an operation scheduled for late December, and alleging that the attorney would not have time to prepare a defense by December 9 (C.T. 32–33). The motion was denied on December 4 (C.T. 36). A motion to dismiss the indictment was denied on December 6 (C.T. 38–40); trial began on December 9 (R.T. 2); and the presentation of the defense case began December 12 (R.T. 469, 478).

ARGUMENT

1. The X-rays and papers seized from the "clinic" by the chief of police were admissible as evidence since they were obtained as incident to a valid arrest. The chief of police plainly had probable cause to believe, and did believe (R. T. 267), that petitioner and Broeringmeyer were practicing chiropractics without a license, in violation of a State statute (Burns' Ind. Stat. Ann. § 63–1336 (1961 Repl.)). State law empowered the chief to arrest such observed misdemeanants without a warrant. *Lander* v. *State*, 238 Ind. 680, 154 N.E. 2d 507. He effected the arrests by expressly announcing that Broeringmeyer was under arrest and that petitioner was also "if he didn't have a license" (R.T. 262), by stating that they "would have to go" with him to the police station (R.T. 261), and by actually assuming custody over them (R.T. 269). There is no merit to petitioner's suggestion that he was not then under arrest because the chief's announcement was conditioned on a future finding that petitioner had no license (Pet. 9–10). The existence of an arrest is not predicated on the words employed, but on the intended assumption of custody and actual assertion of dominion and control. See *Henry* v. *United States*, 361 U.S. 98; *Bolger* v. *United States*, 189 F. Supp. 237, 251 (S.D. N.Y.), affirmed *sub nom. Bolger* v. *Cleary*, 293 F. 2d 368 (C.A. 2), reversed on other grounds, 371 U.S. 392.[1]

[1] In any event, there was no ambiguity in the words used to announce the arrest of Broeringmeyer (R.T. 262, 269), and the accompanying search was independently lawful as an incident of that arrest.

Contrary to petitioner's allegation (Pet. 10), the incidental search occurred before the chief took petitioner and Broeringmeyer to the station (R.T. 262). The chief testified that the objects were seized by him (R.T. 262, 278, 301–302), and on some of them he identified his initials written at the time of seizure (R.T. 279–281).[8] The objects seized were "the things used to carry on the criminal enterprise" (*Marron* v. *United States*, 275 U.S. 192, 199) and were, therefore, subject to seizure at the time of arrest. *Abel* v. *United States*, 362 U.S. 217, 237–238.

2. There was no error in the denial of petitioner's second motion for a continuance. The only grounds offered to secure a delay were petitioner's need for pre-surgery rest and the attorney's need for more time to prepare. In evaluating petitioner's need for rest, the court properly could consider petitioner's apparent disinclination to be examined by the court-designated physician, even after the date originally set (C.T. 28–29).[9] As to the alleged need for more time to

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[8] The chief did testify that he "left Captain Kelley there to pick up some additional things" (R.T. 262), but there is no basis in the record for assuming that any of the items introduced into evidence were the "additional things" which Captain Kelley had obtained.

[9] A letter from another doctor accompanied the motion (C.T. 35), but in view of the nature of the case, it was especially important that the court know the identity and reputation of any doctor submitting written statements. As the court later observed, a doctor submitting a statement could be "one of [petitioner's] many associates" (R.T. 725). For example, Dr. Hawk, the medical doctor whose letter petitioner has lodged with the Clerk of this Court, was a septuagenarian on the staff of a now-defunct clinic administered by petitioner (R.T. 710–711).

prepare, it does not appear that eight months after the indictment was served and two weeks after the second attorney was retained was an unreasonably early time to begin trial. See *United States* v. *Kelley*, 186 F. 2d 598, 600 (C.A. 7), certiorari denied, 341 U.S. 954. The limited time for the second attorney's preparation was directly attributable to petitioner's lack of cooperation with his first attorney. See *Torres* v. *United States*, 270 F. 2d 252, 254 (C.A. 9), certiorari denied, 362 U.S. 921.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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